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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
vs.
BRIAN F. WEBER, ET AL.,
Respondent.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
vs.
BRIAN F. WEBER, ET AL.,
Respondent.

No. 78-436

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
vs.
BRIAN F. WEBER, ET AL.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR GREAT PLAINS LEGAL FOUNDATION

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INDEX

Table of Citations I

Motion for Leave to File Brief *Amicus Curiae* 1

Brief *Amicus Curiae* 5

Argument 5

A. Section 706(g) of Title VII Does Not Authorize an Employer and Labor Union to Establish Racial Quotas 6

B. Employers and Labor Unions Cannot by Agreement Deny Nonminority Employees the Protection of Title VII 9

C. Executive Order 11246 Provides No Defense to an Unfair Labor Practice Otherwise Prohibited by Title VII 13

Conclusion 14

Citations

CASES

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 13

Franks v. *Bowman Transportation Co.*, 424 U.S. 763 7

Furnco Construction Co. v. *Waters*, ... U.S. ....., No. 77-369 (June 29, 1978) 9

Griggs v. *Duke Power Co.*, 401 U.S. 424 9

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 7

Lemon v. *Kurtzman*, 411 U.S. 192 8

McDonald v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 9

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 13

STATUTES AND REGULATIONS

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 *et seq.*:

Section 703(a), 42 U.S.C. 2000e-2(a) 5, 9
Section 703(d), 42 U.S.C. 2000e-2(d) 5, 9
Section 703(j), 42 U.S.C. 2000e-2(j) 9, 10, 12
Section 706(g), 42 U.S.C. 2000e-5(g) 5, 6, 7, 8, 9

MISCELLANEOUS

110 Cong.Rec. 7212 (1964) 11
110 Cong.Rec. 7213 (1964) 11, 12
110 Cong.Rec. 7218 (1964) 12
110 Cong.Rec. 8174 (1964) 10
110 Cong.Rec. 8178 (1964) 10
110 Cong.Rec. 8550 (1964) 10
110 Cong.Rec. 8921 (1964) 10
110 Cong.Rec. 9881 (1964) 12
110 Cong.Rec. 12723 (1964) 12
110 Cong.Rec. 14331 (1964) 12
H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963) 10
Vass, Title VII: Legislative History, 7BC Ind. & Com. L.Rev. 431 (1966) 10

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MOTION BY GREAT PLAINS LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the Great Plains Legal Foundation pursuant to Supreme Court Rule 42 and moves for leave

to file the attached brief *amicus curiae* in Cause Nos. 78-432, 78-435 and 78-436.

Great Plains filed a brief *amicus curiae* by leave of the court in the Fifth Circuit Court of Appeals below. Written consent to file this brief in the Supreme Court was obtained from petitioner, Kaiser Aluminum and Chemical Corporation and respondent, Brian Weber. The Solicitor General advised Great Plains that he would not consent on behalf of the United States and the Equal Employment Opportunity Commission to this brief, but did advise Great Plains that it could advise the Court that he would not oppose this motion seeking leave to file a brief *amicus curiae*. The United Steelworkers Union has not responded to Great Plains' request for consent to file this brief.

Great Plains Legal Foundation is a publicly supported, not-for-profit corporation engaged in nonpartisan legal research, study and analysis for the benefit of the general public on the effect of evolving concepts of law on our democratic institutions. It provides legal representation, without charge, to individuals and organizations at all levels of the judicial and administrative process. It is particularly involved in matters where institutional or governmental policy interferes with individual rights and liberties. While as a matter of policy, Great Plains Legal Foundation abhors discrimination of any kind, it is concerned that activities ostensibly designed to eliminate discrimination, may in fact foster group rights as opposed to individual rights which it champions.

Great Plains has previously participated *amicus curiae* in litigation involving Titles VII and IX of the Civil Rights Act. In addition, it has participated in rulemaking proceedings involving Title VII before the Equal Employment Opportunity Commission.

Great Plains submits that the present case has far-reaching policy implications beyond the particular interest of the private parties.

While the Solicitor General, on behalf of the United States and the Equal Employment Opportunity Commission, purports to represent the public interest, Great Plains believes that the interest of a broad segment of the American public is contrary to the argument advanced by the Solicitor General. Great Plains submits that this public interest is presented in its attached brief and that its brief will be of material assistance to this Court.

For these reasons, Great Plains Legal Foundation respectfully urges the Court grant this motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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BRIEF AMICUS CURIAE

ARGUMENT

The Court is called on to determine whether it is a defense to discriminatory conduct which on its face violates Title VII of the Civil Rights Act of 1964 that the discrimination occurred pursuant to a company/union agreement designed to enhance minority employment in certain positions.

As the government concedes, there can be no doubt that Brian Weber, and the class he represents, established a prima facie case of racial discrimination in employment. Kaiser and the Steelworkers Union by agreeing that promotions from laborer positions to a craft training program would depend not only on plant seniority, but also on race, violated both the general proscriptions against employment discrimination of Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), and the express language of Section 703(d), 42 U.S.C. 2000e-2(d), which provides that it is an unlawful employment practice to discriminate against any individual because of his race in admission to apprenticeships and on the job training programs.

The government contends that the racial quota system adopted at the Kaiser Gramercy Plant is unobjectionable because, given a statistical disparity in minority employees at the plant, a court could fashion a remedy under its equitable powers conferred by Section 706(g) of Title VII which would be similar to the quota system which the company and the union established.

The Steelworkers forcefully contend that a quota system to alleviate minority under-representation is an appro-

priate result of the collective bargaining process, although such a system is beyond the jurisdiction of a Title VII court to decree as remedy for established violations of Title VII. Kaiser argues that it was entitled to agree to a quota system, and in fact was under "compulsion" to do so in order to keep government contracts and to forestall Title VII suits and liability.

We submit that each of the justifications for the quota system fails to establish a defense to Mr. Weber's prima facie case of discrimination and that therefore he is entitled to prevail.

A. Section 706(g) of Title VII Does Not Authorize an Employer and Labor Union to Establish Racial Quotas

The authority of Kaiser and the Steelworkers Union to adopt an affirmative action plan which coupled seniority with race for the purpose of determining which employees were entitled to be admitted into a craft training program at the Gramercy Plant cannot be derived from a court's authority to order affirmative action under Section 706(g). A court under that section would not have such power for three reasons: (1) neither Kaiser nor the Steelworkers engaged in unlawful employment practices at the Gramercy Plant; (2) no victims of past discrimination are made whole or restored to their rightful place by the plan; and (3) the plan is not premised on factual findings which justify the burden it places on nonminority workers such as Mr. Weber.

Section 706(g) permits the ordering of "such affirmative action as may be appropriate" only "[i]f the court finds that the respondent is intentionally engaging in an unlawful employment practice charged in the complaint."

Thus, relief cannot be ordered until it has been proved that the employer, or union, has followed an employment practice of unlawful discrimination, *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 361. Since courts have no power pursuant to Section 706(g) to order affirmative relief when there is no discrimination, it follows that private parties claiming to derive their power from the power of courts under Section 706(g) are limited to cases of actual discrimination. In the present case, the right of Kaiser and the Steelworkers Union to act pursuant to 706(g) fails, if it ever existed, because, as the majority opinion of the Court of Appeals noted, the District Court found that Kaiser "has never been guilty of discriminatory hiring or promotion at its Gramercy Plant" (Pet. App. 17a).

The broad equitable discretion vested by Section 706(g) in the federal courts to "order such affirmative action as may be appropriate" is conferred to effectuate the Congressional objective of making victims whole for injuries suffered on account of unlawful employment discrimination. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 763. In Title VII litigation after discrimination has been found the court must engage in the often difficult task of determining which members of the group discriminated against are actual victims, *International Brotherhood of Teamsters* v. *United States, supra,* at 431 U.S. 371-372. Such victims are then entitled to specific relief which will make them whole for their past deprivation. As the court noted in the *Teamsters* case, *id.,* n. 61 ". . . '[i]f a discriminatee is ultimately allowed to secure a position before a laid-off linedriver [who is not a victim of discrimination] . . . he will do so because of the bidding power inherent in his [court ordered] rightful-place seniority, and not because of a preference

based on race." A court has no occasion to design specific relief for nonvictims.

Even when a court orders affirmative relief for the actual victims of discrimination, it must consider the equities of nonvictim employees whose legitimate expectations may be eroded. In balancing the competing interests of victims and nonvictims the court "must 'look to the practical realities the necessities inescapably involved in reconciling competing interests', in order to determine the 'special blend of what is necessary, what is fair, and what is workable'." *Id.*, at 375, quoting *Lemon* v. *Kurtzman*, 411 U.S. 192 (Opinion of Burger, C.J.). In performing that difficult task a court "should clearly state its reasons so that meaningful review may be had on appeal." *Teamsters, supra*, 431 U.S. at 376.

The difficulty in forming appropriate Section 706(g) remedies suggests that the district court was correct in its determination that Section 706(g) is only for courts and not private parties. But even if the equity of 706(g) need not be the exclusive domain of a chancellor, the equity that was performed by Kaiser and the Steelworkers is wholly defective. It provides the windfall remedy of fictional seniority for advancement to craft positions to minority employees who have suffered no wrong and denies to Mr. Weber and his class the color-blind treatment to which they are entitled under Title VII. Such a perverted application of 706(g) clearly does not provide a defense to Mr. Weber's *prima facie* case of unlawful employment discrimination.

B. Employers and Labor Unions Cannot by Agreement Deny Nonminority Employees the Protection of Title VII

The Steelworkers Union, unlike the government, does not justify the quota system at the Gramercy, Louisiana, Plant by relying on a court's power pursuant to Section 706(g) to order affirmative action for violation of Title VII. Rather the union contends that private affirmative action plans which classify employees by race for the purpose of alleviating minority under-representation in certain job positions is not an unfair employment practice proscribed by Title VII.

There is no doubt that Mr. Weber is at a disadvantage in securing admission to the Gramercy Plant's craft training program *vis-a-vis* his fellow employees who differ from him only, insofar as this case is concerned, by race. On its face the separate race-conscious seniority lists maintained for admission into the craft training program is precisely the type of classification that is expressly prohibited by Section 703(a) and (d) of Title VII. The fact that minority employees are under-represented in craft positions does not condone the unfair employment practice of classifying seniority by race since "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce. See *Griggs* v. *Duke Power Company*, [401 U.S. 424 at 430]; *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976)." *Furnco Construction Co.* v. *Waters*, ... U.S. ....., No. 77-369 (June 29, 1978). (Emphasis in opinion).

Indeed Section 703(j) expressly provides that Title VII is not to be construed to require preferential treatment for

minority employees who are under-represented in the work force. The Steelworkers argue that that section is not applicable to this case because the agreement between the Steelworkers and Kaiser was not "required" but voluntary and therefore outside the purview of Section 703(j). This argument is premised entirely upon legislative history of Title VII. However, examination of the history shows clearly that the purpose of Section 703(j) was to make certain that quotas were not required by other provisions of the 1964 Civil Rights Act and not to authorize voluntary quotas as an exception to other provisions of the Act.

H.R. 7152, the Bill that became the Civil Rights Act of 1964, did not contain Section 703(j) [42 U.S.C. §2000e-2(j)]. See: H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963); Vass, Title VII: Legislative History, 7BC Ind. & Com. L.Rev. 431 (1966). One of the objections to Title VII, as embodied in H.R. 7152 advanced by its opponents, was that it would require or permit a racial quota system. See, *e.g.*, Remarks of Senator Smathers, 110 Cong.Rec. 8174-8175, 8550 (1964); Remarks of Senator Tower, 110 Cong.Rec. 8178-8180 (1964). The Bill's supporters even before the Amendment which added §703(j), contended that since Title VII prohibited consideration of race in employment, it therefore prohibited racial quotas favoring minorities. *E.g.*, Remarks of Senator Williams, 110 Cong.Rec. 8921 (1964).

Even in the presence of pre-Act discrimination, it was not the intent of Congress to accord special privileges to the victims of such discrimination. For example, the Interpretive Memorandum of Senators Clark and Case states:

> "Thus, for example, if a business has been discriminating in the past and as a result, has an all-white working force, when the Title comes into effect, the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. *He would not be obliged—or indeed, permitted—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or, once negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" 110 Cong.Rec. 7213 (1964). (Emphasis added).

Nor was it intended that the Act should constitute a basis for preferential treatment to achieve a racial balance. Title VII and Preferential Treatment, *supra* at 684-685. The Congressional intent was expressed in the following manner:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." Interpretive Memorandum of Title VII of H.R. 7152 submitted jointly by Senators Clark and Case, Floor Manager, 110 Cong.Rec. 7212, 7213 (1964).

Notwithstanding such statements of legislative intent, an Amendment was introduced to expressly prohibit the use of quotas. The sponsor of the Amendment, Senator Allott, stated:

> ". . . I do not believe Title VII would result in imposition of a quota system.
>
> * * *
>
> "But the argument has been made, and I know that employers are also concerned with the argument. I have, therefore, prepared an amendment which I be-

lieve makes it clear that no quota system will be imposed if Title VII becomes law." 110 Cong.Rec. 9881 (1964).

Thereafter, the Dirksen-Mansfield substitute was put before the Senate, which contained §703(j). Senator Humphrey, one of the drafters, stated:

> "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this Bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly." Remarks of Senator Humphrey, 110 Cong.Rec. 12723 (1964).

The legislative history of the Act clearly condemns the use of quotas to achieve racial balance as constituting a discriminatory practice. *E.g.*, 110 Cong.Rec. 7213 (1964) (Memorandum of Senators Case and Clark); 110 Cong.Rec. 7218 (1964) (Memorandum of Senator Clark); 110 Cong. Rec. 12723 (1964) (Remarks of Senator Humphrey); 110 Cong.Rec. 14331 (1964) (Remarks of Senator John J. Williams).

Senator Clark, in the memorandum supporting adoption of the Act, responded to one objection in the following manner:

> "Objection: The bill would require employers to establish quotas for minorities in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory." 110 Cong.Rec. 7218 (1964).

If Title VII were read as the Steelworkers suggest, employers would be free to suspend the application of Title VII to nonminority employees at will. Such power simply is not vested in private parties by Title VII as *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 illustrates. That case held that an employee was not restricted to the arbitration provisions of a collective bargaining agreement which purported to be the exclusive means of resolving disputes when the employee's grievance arose under Title VII, since Title VII guaranteed access to the courts in a fashion that could not be nullified by private agreement.

In arguing that private agreements between an employer and a union did not excuse violation of Title VII, we are not contending that voluntary action has no place in making equal employment opportunity a reality. There clearly are many steps that unions and employers can take to assure that job opportunities are available on a nondiscriminatory basis. Such voluntary action should be encouraged up to the point where it deprives other employees of rights protected by Title VII. This is the threshold the courts below found was crossed and that determination should be affirmed.

C. Executive Order 11246 Provides No Defense to an Unfair Labor Practice Otherwise Prohibited by Title VII

It is clear that an Executive Order cannot take precedence over a valid act of Congress relating to the same subject. See, *i.e.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. A decision on the applicability of Title VII to the facts of this case will resolve all matters presented for review, thus there is no need to further consider to what extent Executive Order 11246 is consistent with Title VII.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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